United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1389

To be argued by
BANCROFT LITTLEFIELD, JR.

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1389

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST MALIZIA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

BANCROFT LITTLEFIELD, JR.,
S. ANDREW SCHAFFER,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1389

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERNEST MALIZIA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ernest Malizia appeals from a judgment of conviction entered on March 19, 1974, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 71 Cr. 710 filed on June 26, 1971 charged Ernest Malizia and Joseph Malizia in Count One with the sale of 915.4 grams of heroin, and in Count Three with conspiracy to sell heroin and cocaine and in Count Two charged Ernest Malizia with the sale of 995 grams of cocaine in violation of Title 21, United States Code, Sections 173 and 174. Superseding indictment 74 Cr. 150 was filed on February 11, 1974 and charged the same defendants with the same crimes charged in Indictment 71 Cr. 710.

Ernest Malizia was a fugitive until December 18, 1973 when he was arrested. Joseph Malizia is still a fugitive.

The trial of Ernest Malizia on Count Two of Indictment 74 Cr. 150 commenced on February 13, 1974 and concluded on February 15, 1974, when the jury returned a verdict of guilty.*

On March 19, 1974, Ernest Malizia was sentenced to a term of ten years imprisonment and a $20,000 fine. Malizia is presently serving his sentence having failed to post bail of $500,000 cash or surety bond.

Statement of Facts

The evidence at trial established that on February 17, 1971, Ernest Malizia sold approximately 995 grams of cocaine to a paid informant of the government, Stanley Gerstenfeld, also known as "Boom Boom", at Christine's Luncheonette, 349 Pleasant Avenue in Manhattan. Since Gerstenfeld had disappeared and could not be located by the agents he did not testify at the trial which took place almost three years after the commission of the crime. The government's evidence therefore consisted largly of the testimony of seven federal and state narcotics agents who had observed the sale take place inside the luncheonette and had kept Gerstenfeld in their sight at all times from before the sale when they met with him and provided him with $16,500 to make the purchase until after the sale when they received the package of cocaine from him. The government also introduced evidence that Malizia had fled after he realized he was about to be arrested in February, 1971, and that despite extensive efforts by many government agents to locate him he remained a fugitive until he was

---

* Prior to trial Judge Motley granted the government's motion to sever Counts One and Three against Ernest Malizia because Joseph Malizia remained a fugitive.

apprehended on December 18, 1973. Further evidence of Malizia's consciousness of guilt consisted of his adoption of a physical disguise and his use on at least two occasions of false names while he was a fugitive.

A. The Suppression Hearing

On December 5, 1971, Malizia was arrested in Rockland County on an incident following a traffic charge. At the time he claimed his name was John Conite and carried false identification papers in that name. On that occasion he made bail and fled within a few hours, before the police had determined his true identity. On December 18, 1973, when he was finally arrested by narcotics agents he carried identification papers in the name of Harry Luppes and claimed that was his own name.

Prior to trial a suppression hearing was held to determine whether Malizia's statements to the Rockland County Police that his name was John Conite, and to Federal narcotics agents that his name was Harry Luppes were admissible. Judge Motley found that both were admissible because both followed lawful arrests based on probable cause.

B. The Government's Case

1. The sale of 995 grams of cocaine by Malizia

At 6 p.m. on February 17, 1971, Group Supervisor Leonard Vecchione of the Federal Bureau of Narcotics and Dangerous Drugs (B.N.D.D.) met with a group of Federal and State narcotics agents at B.N.D.D. headquarters in New York and instructed them to take up surveillance locations at 8:00 p.m. in the area of Christine's Luncheonette, 349 Pleasant Avenue in Manhattan. Vecchione and Senior Investigator Edward Kayner of the New York State Police then proceeded to the area of Park Place and Church Street

and met with the government's informant, Stanley Gerstenfeld, who was also known to them by the nickname Boom-Boom. Vecchione carefully searched Gerstenfeld and found only $10.33 and no contraband. Gerstenfeld was instructed to enter the back seat of a State Police undercover taxicab driven by State Police Investigator George Gross, and Vecchione handed Gross a paper bag containing $16,500 advanced government funds.* Gross and the informant then proceeded in the taxicab to Christine's Luncheonette. Vecchione and Kayner in an unmarked police vehicle and B.N.D.D. Agent John Maltz in a second vehicle followed Gross and Gerstenfeld in the taxicab to the area of Christine's Luncheonette. At no time on the ride to Christine's Luncheonette did Gerstenfeld leave the taxi (Tr. 16-25, 152-158, 225-226, 253-257).**

At approximately 9:15 p.m. the taxi arrived in front of Christine's Luncheonette. Investigator Gross handed Gerstenfeld the paper bag with the $16,500 advanced government funds, and Gerstenfeld got out of the taxi and entered Christine's Luncheonette. The luncheonette was located down a few steps from the level of the sidewalk and had two large glass windows on both sides of a glass door. Because it was well lit the entire inside of the luncheonette was clearly visible through the glass to the agents looking in from the outside. A serving counter ran from front to back, perpendicular to the street on the left side of the store. Standing alone behind the counter inside the luncheonette was Ernest Malizia. Gross watched from the taxi as Gerstenfeld approached Malizia and handed him the bag of money. Malizia removed the money from the bag and thumbed through it, appearing to count the bills.

---

* The taxi had been kept locked in a State Police parking garage before being used to pick up Gerstenfeld and it contained no contraband. The records of the $16,500 were introduced at trial (GX 1 and 11). References to "GX" are to Government's Exhibits at trial.

** References to "Tr." are to pages in the trial transcript.

At this moment, Vecchione and Kayner stopped their vehicle for a moment in front of the luncheonette beside Gross' taxicab and watched also as Malizia counted the money. A minute or so later Vecchione and Kayner drove off and Gerstenfeld came out of the luncheonette, spoke through the window of the taxi to Gross, and returned to the luncheonette where he sat on a stool in front of the counter. Gross waited in the taxi in front of the luncheonette acting as if he were filling in a taxi trip sheet, and saw Malizia walk around from behind the counter, with a yellowish package in his hands. Malizia lifted up the back of Gerstenfeld's three-quarter length leather jacket and stuck the package inside Gerstenfeld's belt in the small of his back and pulled the jacket down over the package. Gross then drove the taxicab away from the front of the luncheonette (Tr. 25-29, 159-164, 257-258).

A few minutes after the taxicab departed, Agent Maltz who had been stationed on foot across Pleasant Avenue from the luncheonette saw Gerstenfeld leave the luncheonette and walk south on Pleasant Avenue to the corner of 118th Street. At the corner, Gerstenfeld turned and walked west on 118th Street. As Gerstenfeld, walked down 118th Street, he was kept in constant surveillance first by Lieutenant Pinto, then by Investigator O'Leary, and finally by Senior Investigator Mahoney, all of the State Police. When Gerstenfeld reached the corner of 118th Street and First Avenue in sight of Investigator Mahoney he hailed a passing taxicab and proceeded to 86th Street and York Avenue followed closely behind by Agent Maltz who had driven to the corner where Gerstenfeld entered the taxicab. At 86th Street and York Avenue, Gerstenfeld met Investigator Gross and entered Gross' taxicab which was waiting on the street. Gross drove Gerstenfeld to 89th Street and York Avenue where by prearrangement they met Vecchione and Kayner. Vecchione entered the back seat of the taxicab and received from Gerstenfeld the yellowish package (GX 2-5). Subsequent analysis by a government chemist determined that

the package contained approximately 995 grams of cocaine. From the moment Gerstenfeld left Christine's Luncheonette on foot to the moment he arrived by taxi at 86th Street and York Avenue and met Gross, Gerstenfeld was under constant surveillance by the agents and they testified he did not receive the package of cocaine during that period (GX 21) (Tr. 28-35, 164-167, 227-231, 258-261, 301-309, 339-341, 344-350).

Meanwhile, ten minutes after Gerstenfeld left the luncheonette, Malizia came out of the luncheonette and was seen by the agents walking south on Pleasant Avenue, to 113th Street. At the corner he turned west and went to the trunk of a blue Pontiac with New York License UBB 262, parked by the curb.* He opened the trunk, placed a brown paper bag which appeared to be the paper bag which had contained the $16,500 government funds in the trunk, and walked back to the luncheonette (Tr. 29-31, 259-360, 309-311, 341-342).

2. Malizia's flight to avoid arrest

On the evening of February 24, 1971, agents attempted to locate Malizia in New York City to arrest him. However, they could not locate him the first evening in New York City or at his house in Nanuet, New York. Early the next morning the agents interviewed Malizia's wife and children about his whereabouts but met with no success.**

---

* New York State Motor Vehicle Records introduced at trial proved that the Pontiac was registered to Malizia's brother's wife (GX 9).

** Actions of some agents including stopping a vehicle driven by John Malizia and registered to the wife of Joseph Malizia, Ernest Malizia's brother and co-defendant, which was to be seized in connection with the arrest of Joseph Malizia may have tipped off Ernest Malizia to the fact that he was being sought by the agents (Tr. 3326-3331). The subsequent interviews of Malizia's family and neighbors surely tipped him off if he were not already aware that he was being sought.

Thereafter State Police Investigator Koran maintained surveillance at Malizia's home steadily for three weeks and Malizia did not return home. Over the next two years different teams of agents returned to Malizia's house on a regular basis and maintained surveillance for eight or ten hours at a time, but were unsuccessful in locating him. Agents also maintained surveillance of Malizia's home and the homes of his relatives during Christmas and Thanksgiving, 1971 and 1972, but at no time did Malizia appear (Tr. 389-398, 399-400).

3. Malizia's use of false names while a fugitive

At approximately 2:00 a.m. on December 5, 1971, Deputy Sheriff Francis Butrico of the Rockland County Sheriff's Office stopped a vehicle for operating with faulty headlights while he was on duty on road patrol on Route 303 in Rockland County. The driver of the car identified himself as, and produced identification for Joseph Cerone. The passenger, later identified as Ernest Malizia, said he was John Conite and produced a driver's license in that name (GX 13). After Butrico determined that Cerone's license was a forgery, both men returned with Butrico to Sheriff's headquarters where an altercation occurred and Conite (Ernest Malizia) and Cerone were arrested. Ernest Malizia also had with him at the time a selective service card in the name of John Conite (GX 14). Subsequently both men were photographed, fingerprinted and arraigned.* Both men promptly made bail and neither returned to Rockland County Court as required.** Butrico identified Malizia in Court as the man who had said he was John Conite and this was confirmed by an examination of the Rockland County photograph (GX 15) (Tr. 401-412, 414-416).

---

* Malizia also signed the fingerprint card as John Conite (GX 16, 17). The photograph of Malizia that night showed him with a mustache and with his hair worn very differently than in court. He had no mustache on February 17, 1971 (GX 15; Tr. 260).

** Additionally, Butrico said that neither man ever returned to the Sheriff's office to pick up the car, in which they were driving that night.

On December 18, 1973, Federal Narcotics agents on surveillance duty in the vicinity of 236th Street and Johnson Avenue in the Bronx recognized Ernest Malizia standing by a red Chevrolet registered to Harry Luppes. They approached Malizia and questioned him. He first said his name was John Doe, then showed the agents a driver's license in the name of Harry Luppes and said the name on the license was his name (GX 18) (Tr. 420-426).

C. The Defense Case

Henry Peters and his wife, Joanne Peters, were called as witnesses by the defendant Ernest Malizia. Henry Peters testified that he had owned Christine's Luncheonette in 1970 until June 28, 1971 when he left for California. He said that he or his wife operated the luncheonette from 9:00 A.M. to 10:00 or 11:00 p.m. everyday except some Sundays. He said he had known Ernest Malizia and his brothers as customers at the luncheonette, that he never gave keys to the luncheonette to Ernest Malizia, that Ernest Malizia never was allowed behind the counter of the luncheonette, and that it was difficult to see into the luncheonette from the outside through the windows because the window by the counter was always greasy and partially blocked by a glass enclosure inside. Joanne Peters direct testimony was essentially the same as her husband's (Tr. 442-468, 489-495).

On cross-examination, Henry Peters was asked whether, in view of the testimony at trial concerning Ernest Malizia in the luncheonette on February 17, 1971, he knew if Malizia had been in the luncheonette on that day. Peters answered that he was positive that Ernest Malizia was not in the luncheonette on February 17, 1971, although he kept no records of who came to the luncheonette on any day, had no special reason for remembering that day from other days and had not been asked about that day until the day before the trial (Tr. 484-486). Joanne Peters said she had left for California prior to February 17, 1971 so she did not know whether Malizia was in the luncheonette that day or not (Tr. 468-486, 496-497).

ARGUMENT

POINT I

Malizia was not denied a fair trial by the improper admission of prejudicial testimony.

Ernest Malizia contends that his conviction should be reversed because the jury heard: (a) testimony that while Stanley Gerstenfeld, the informant, worked with Agent Vecchione he had told Vecchione that he would never testify (in any of the cases on which he was working) because he was in fear of being killed; (b) mention of an operation Flanker and (c) a suggestion that the Bureau of Narcotics had access to a copy of Malizia's fingerprints. Malizia's arguments are without merit.

A. The informant's fear

Malizia argues in effect that Judge Motley abused her discretion in admitting the evidence of the missing informant's state of mind as an explanation for his unavailability as a witness.* He claims that the testimony was extremely prejudicial and had "virtually no relevance to the issue of the failure of the Government to call [the informant]" Brief p. 11). To the contrary, a satisfactory explanation as to why the Government had failed to produce its own paid employee who it claimed had purchased the narcotics from Malizia was absolutely critical to the Government's

---

* Malizia does not contest Judge Motley's ruling that the statement was not barred by the hearsay rule "since it was limited to bringing out the informant's state of mind" (Tr. 43-44). *Frank* v. *United States*, 220 F.2d 559, 564 (10th Cir. 1955); *Mattox* v. *News Syndicate Co.* 176 F.2d 897, 903-904 (2d Cir.) *cert. denied*, 338 U.S. 858 (1949); see also *Case* v. *New York Central Railroad Co.*, 329 F.2d 936 (2d Cir. 1964); VII Wigmore, *Evidence* § 1790 (3d 1940).

case.* While proof of an unsuccessful search for the informant might, as Malizia suggests (Brief, p. 10), have enabled the Government to avoid an unfavorable charge to the jury, it would in no way have weakened defense arguments disparaging the sincerity of efforts to find the informant, suggesting that the informant's testimony would not have supported the Government's case, and urging that his absence alone raised a reasonable doubt as to the defendant's guilt (Tr. 519-521, 536).

Because of the natural adverse inference which arises when a party fails to call a witness who might ordinarily be expected to give favorable testimony to his cause, judges are properly invested with broad discretion to permit such party to explain away the harmful inference:

> "[T]he party affected by the inference may of course *explain* it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon his right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for non-production" (emphasis in original).

2 Wigmore, Evidence § 290, at 178 (3d ed. 1940).

---

* Judge Motley expressed this point as follows:

"The next question is whether bringing out (the informant's state of mind) is nevertheless so prejudicial as to outweigh its probative value. It seems to me that because of the importance of the informer in this case, that is, he is the actual purchaser of the narcotics, why he isn't here is very important.

"Unlike most of these cases where the purchaser is a Government agent, and he testifies as to having made the purchase, here we have an informant who told the agents that he is afraid to testify. He is the one who actually made the purchase. So, as I have said, the question is whether this information that he is afraid to testify because of fear is so prejudicial as to outweigh its probative value.

"It seems to me it has very high probative value under the circumstances of this case" (Tr. 44).

In upholding the receipt of testimony concerning the ill health of a Government witness and the introduction of the subpoena which had been served on him, the Eighth Circuit has stated:

> "It would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness, . . . the opposing party were not permitted to introduce evidence to excuse the absence of such witness." *Schumacher* v. *United States,* 216 F.2d 780, 787-788 (8th Cir. 1954), *cert. denied,* 348 U.S. 951 (1955).

See also, *United States* v. *McCaskill,* 481 F.2d 855, 857 (8th Cir. 1973) (citing the passage from Wigmore excerpted above, defendant's conviction reversed because court restricted his ability to explain the non-production of a presumed favorable witness); *Case* v. *New York Central Railway Company,* 329 F.2d 936, 937-38 (2d Cir. 1964); *Commonwealth* v. *Costello,* 119 Mass. 214 (1875) (no adverse inference where the missing defense witness had been threatened by the prosecution on a collateral charge and had fled the jurisdiction).

Thus it was clearly proper in the present case for the Government to introduce testimony to explain why the informant was unavailable for trial. The Government's explanation consisted first of the fact that agents had looked for the informant when they realized the Malizia trial would be held but had not been able to locate him (Tr. 41-42).* This explanation, however, went only part way, since it provided only confirmation of the fact that he was not there but no explanation of, or reason for his absence. That the Government had looked for the inform-

---

* The agents' attempts to locate Malizia were the subject of extensive cross-examination of Agent Vecchione (Tr. 70, 107-109).

ant but had not found him did not effectively foreclose the issue to the defense, because if the informant was working for the Government (as the jury of course knew he had been), then it was not readily believable that the Government could not find him. The credible and the truthful explanation for his not being found was that he did not want to be found because he feared testifying. Therefore only by testimony showing that the informant did not want to be found could the Government defend against the drawing by the jury of an unfavorable inference.

In addition to understating the importance of the evidence of the informant's state of mind, Malizia also overstates its prejudicial character. The informant's fear of being killed was a general statement and was not articulated as a fear of Ernest Malizia. The jury heard during the cross-examination that the informant had worked for Vecchione on other cases for at least four months prior to making the purchase from Malizia. Nothing about the statement pointed to Malizia as being a potential killer.* Rather the statement was directed to the informant's fear of testifying for the Government in any case in which he had been an informant.**

Moreover, far more prejudicial evidence of the tenor here at issue has been held admissible when it was similarly explanatory of the presence or absence of other testimony in a trial. In *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972) the court held it was proper for a witness to

---

* This point was made even clearer on cross-examination of Vecchione by Malizia's counsel. Vecchione specifically stated that the informant had never told him nor had Vecchione heard from any source that Ernest Malizia was trying to kill the informant (Tr. 69-71).

** Furthermore, it is unlikely that this statement by the informant surprised any of the jurors, since it is safe to say that most New Yorkers realize that being an informant in the narcotics trade is a dangerous business.

explain that the reason he had not as seriously implicated the defendant during prior interviews with BNDD agents and before the grand jury as he had done at trial, was because he had been told at the time by third parties that if he did so the defendant would have had him killed. See also, *United States* v. *Berger*, 433 F.2d 680, 683-684 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *United States* v. *Franzese*, 392 F.2d 954, 960-961 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969); *United States* v. *Scandifia*, 390 F.2d 244, 250 (2d Cir. 1968). In *Cirillo* the prejudice to the defendant was obviously greater than in the present case because it was stated that it was Cirillo himself who would have had the witness killed. As Judge Friendly wrote in *Franzese, supra*, 392 F.2d at 960, "While rehabilitation of this sort may well have a spill-over effect *the process is essential to development of the truth* and reliance must be placed on trial judges to prevent unfair tactics by the prosecution."* (Emphasis supplied)

Finally, even should it be determined that Judge Motley abused her discretion in admitting the statement, its admission was harmless because the rest of the evidence against Malizia was overwhelming. *Chapman* v. *California*, 386 U.S. 18 (1967); *Harrington* v. *California*, 395 U.S. 250 (1960); *United States* v. *LaValle*, 415 F.2d 150 (2d Cir. 1969), *cert. denied*, 397 U.S. 951 (1970); *Wapnick* v. *United States*, 406 F.2d 741 (2d Cir. 1969). Seven agents testified

---

* Wigmore's reasons for allowing such testimony to explain prior inconsistent statements are similar to his reasons for allowing explanations of why a witness whose testimony would be expected to be favorable to a particular party was not produced.

> [An] "impeached witness may always endeavor to explain away the effect of [a] supposed inconsistency by *relating whatever circumstances would naturally remove it.*" 3A Wigmore, Evidence § 1044, p. 1062 (Chadbourn rev. 1970) (emphasis supplied).

that they had participated in the surveillance of the sale of February 17, 1971. Three saw Malizia and the informant together in the luncheonette and Malizia counting the money. One saw Malizia hand the informant the package. Four saw Malizia take the bag of money to the trunk of his car. Others surveilled the informant throughout the evening and determined he met with no one else who could have sold him the package. In addition, Malizia fled shortly after the commission of the crime and used at least two false names and disguised his appearance while a fugitive to avoid being apprehended. Finally, it was obvious that Malizia's witness Henry Peters was ready to lie to save Malizia when he remembered for no reason that Malizia was not in the luncheonette on February 17, 1971. Malizia's counsel told the jury in his summation, "if you don't believe Henry Peters, then you must convict." Since Peters' testimony was so clearly fabricated, this was what the jury may have done (Tr. 523).

B. Operation Flanker

Malizia next contends that the government twice purposefully elicited testimony over objection by defense counsel that Malizia was the target of "Operation Flanker," that this testimony was designed to prejudice the jury and establish that Malizia's was a big case involving important criminals, and that because of this testimony the conviction should be reversed. An examination of the record and the context of the use of the term Operation Flanker shows that none of these contentions are true. First, the reference to Operation Flanker was not objected to by defense counsel at any time. Second, the testimony was not purposefully elicited by the prosecutor to prejudice Malizia. Third, Malizia suffered no prejudice from the remarks since the reference added nothing to the existing testimony and did not imply that Malizia was the target of a "big case involving important criminals."

In connection with proving that Malizia had been a fugitive it was necessary to show that among the ways Malizia might have become aware of the fact that he was being sought for arrest by the agents starting the night of February 24, 1971, was that an automobile in which the agents suspected Malizia might be but was not, had been stopped and agents had advised the driver, Malizia's brother John, that they were looking for Malizia. To prove this point, Investigator Gross was asked on direct examination whether he had been involved in the attempt to locate and arrest Ernest Malizia that first night. Gross said he had located the particular automobile that night in which it was thought Ernest Malizia might be, but John Malizia had been operating the vehicle.* During this testimony Gross testified as follows:

> "Q. What brought you to John Malizia exactly? A. Well, the night of the Operation Flanker——
>
> "Q. What brought you to John Malizia? A. The vehicle he was operating.
>
> "Q. What about this vehicle? Generally speaking, what about that vehicle? A. It was owned by one of the Malizias and we were awaiting possibly that Ernest Malizia might come out and operate that vehicle (Tr. 168)."

Clearly this inadvertent reference to Operation Flanker, under the circumstances would have meant nothing to the jury. The mere fact that a police operation, involving a number of arrests, has apparently been referred to by a code word does not imply a big case with important criminals.

---

* It was also brought out on cross-examination of Investigators Gross and Pinto that John Malizia was arrested that night, not on a narcotics violations, but for interfering with governmental administration when agents attempted to seize the car he was driving and he wouldn't get out of the car (Tr. 169, 325-326).

The second reference to Operation Flanker was even less significant. The attempts to locate Malizia and the arrests on February 24th, had been explored by defense counsel on cross-examination of Investigator Pinto in an effort to persuade the jury that since the Government was also trying to arrest Joseph Malizia that first night and had ended up arresting John Malizia as well, the Government must not have been certain that it was Ernest Malizia who had been in the luncheonette and sold the cocaine but might have thought it was one of his brothers, Joseph or John (Tr. 323-326). It was, in short, thought by defense counsel to be a favorable point for Malizia that his brothers had also been involved that night, and further, that Pinto was a good witness with whom to explore this issue since Pinto had not positively identified Malizia from the night of the sale.* Following this cross-examination, on redirect examination, the following exchange occurred between Pinto and the prosecutor:

> "Q. Do you know what happened on February 24 and 25? A. It was an operation of the federal government called Flanker, that is the night they brought it down, the night of the 24th.
>
> "Q. By brought it down, what do you mean? A. arrested the various defendants and seized the automobiles" (Tr. 329).

Again the reference to Flanker was passing, and not dwelled on in any way designed to prejudice Malizia, nor would the jury necessarily have concluded anything more from the reference than they already knew: that a number of defendants were arrested that night, among them Malizia's brothers (a point stressed by the defense) and possibly others involved with the informant, Gerstenfeld, (also a point stressed by the defense since it was the defense

---

* Pinto's positioning in relation to the luncheonette the night of the sale was such that he could not see into the luncheonette.

which established that Gerstenfeld had been paid to work for the agents for a number of months before he bought the cocaine in the luncheonette from Malizia).

Given the lack of defense objection or a request for a curative instruction and given the passing nature of the references, surely there was no plain error. See *United States* v. *Cioffi*, 493 F.2d 1111, 1119 (2d Cir. 1974) where a government witness' comment that he was employed in the Organized Crime Division of the F.B.I. was not plain error.*

C. Malizia's fingerprint card

Malizia next contends that it was plain error for Investigator Kayner to have made passing reference in his testimony to having brought three fingerprint cards from the Federal Bureau of Narcotics, among which was Malizia's, to the State Police Laboratory to compare with a fingerprint located on the innermost plastic bag containing the cocaine sold to the informant. Contrary to the assertions in Malizia's brief, the fact of the existence of the fingerprint card arose under circumstances which far from prejudicing the defendant, helped him, and the contention is accordingly without merit.

---

* The two cases cited by Malizia in his brief involved explicitly prejudicial hearsay evidence rather than an incidental reference to a code word. In *United States* v. *Marrero*, 486 F.2d 622 (7th Cir. 1973) the prosecutor asked the narcotics agent whether in his capacity as an agent sometimes supervising a major investigation, . . . (he kept) a file on major violators in his office." The agent said he did. The prosecutor then asked whether there was such a file in the agent's office on the defendant and the agent said there was. *Marrero, supra*, 486 F.2d at 625. In *United States* v. *Brown*, 451 F.2d 1231, 1234, 1235 (5th Cir., 1971) the prosecutor specifically elicited from the sheriff witness and stressed the point three times, that the sheriff kept a list of primary narcotics targets and that the defendants were on that list.

The testimony about fingerprints came in through Investigator Kayner who had examined the three wrappings around the cocaine for fingerprints shortly after the sale on February 17, 1971. Kayner testified, first, that no prints at all had been readable from the outer two wrappings, but that a partial print had been removed from the innermost plastic bag, and, second, that the partial print from the innermost bag had been compared with known parts of Malizia's but was not his.*

It is clear that the reference to the fingerprint card helped the defense. Had the testimony simply been that a partial fingerprint had been detected but could not be identified, the jury could still speculate that the partial print was that of the defendant. By adducing evidence that the partial print had been compared to Ernest Malizia's and found not to be his, the Government foreclosed such speculation adverse to the defendant. Defense counsel

---

* Kayner's direct testimony on this subject is as follows:

"Q. Did you find any fingerprints of any kind that could be read on the masking tape? A. No.

"Q. Did you find any fingerprints of any kind that could be read on the inside plastic bag? A. No.

"Q. On the innermost plastic bag did you find anything? A. There was a partial print which I thought possibly there might be enough points to come up with something.

"Q. What did you do with that? A. I took this bag and brought it to K Troop Headquarters in Hawthorne, New York, and gave it to Investigator Lind.

"Q. Did you take comparison fingerprints with you? A. I brought three cards with me from the Federal Bureau of Narcotics.

"Q. Was among those cards Mr. Malizia? A. Yes, sir.

"Q. Did he compare, if you know, the fingerprint on the Malizia card to the fingerprint you had found? A. Yes, sir.

"Q. Was he able to make a comparison? A. He told me negative, no comparison (Tr. 266-267).

obviously recognized the value of this testimony. Not only did he refrain from objecting, he vigorously explored and exploited the issue both on cross-examination (Tr. 276-78)*

---

* Cross-examination of Kayner:

"Q. You are the gentleman that submitted the fingerprints or rather dusted for latent fingerprints, is that correct? A. Yes, sir, I did.

"Q. Whatever you found—you said you found a partial print—was submitted to the laboratory and checked with somebody else's fingerprints, isn't that correct? A. Yes, sir.

"Q. Ernest Malizia's fingerprints were checked against that partial print, isn't that right? A. Yes, sir.

"Q. It came back what we call negative? A. Yes, sir.

"Q. In other words, no identification of Ernest Malizia as being the same as that partial print, is that correct? A. That is right.

"Q. But you didn't only submit Ernest Malizia's fingerprints, you submitted other people's fingerprints, is that correct? A. Yes, sir.

"Q. You submitted John Malizia's fingerprints? A. I submitted two brothers.

"Q. John and Joseph Malizia, is that correct? A. Could be Joe. Might be. I don't know the other one.

"Q. Did you see John Malizia on the night of February 17 when you were in your vehicle? A. No, sir.

"Q. Did you see Joseph Malizia on the night of February 17 when you were in your vehicle? A. No, sir.

"Q. Was it your decision to submit John Malizia and Joseph Malizia's fingerprints for comparison check? A. No, sir.

"Q. You were told to do so by Vecchione? A. I believe so.

"Q. The purpose of fingerprints is for identification, is that correct? A. Yes, sir.

"Q. The surest form of identification known to man today? A. I would say so" (Tr. 276-278).

and in summation (Tr. 517).**

Malizia's reliance upon *United States* v. *Harrington*, 490 F.2d 487 (2d Cir. 1973) is unavailing. There this Court reversed a conviction because front and side view mug-shots of a defendant were received in evidence in such a manner as to accentuate an implication of a prior criminal record. In addition the portion of the mug-shots which contained markings depicting the post-arrest circumstances of the taking of the photographs had been concealed by tape in a "grossly incompetent fashion." Here, by contrast, the demonstrative evidence was never introduced at all. The only reference to fingerprints was verbal, not visual.*

Moreover, a passing reference to the government's possession of a defendant's fingerprints is far from inherently

---

** Summation by Malizia's counsel.

> "And then we have the issue of fingerprints. They submitted that package, one of the packages for fingerprint analysis. You heard the agent testify it came back negative. Negative means Ernie Malizia's fingerprints were not on it.
>
> But they didn't just submit Ernie Malizia's fingerprints for comparison, they submitted John Malizia and Joseph Malizia. Well, the agents saw the package transferred from Ernie Malizia to Stanley Gertsenfeld and Gross testified he stuffed it in his back. How come they are now making comparisons with the fingerprints? I mean, are they trying to find out who actually transferred the package or do they know?" (Tr. 517).

* Malizia cites no case where a reference in testimony before a jury to the prior existence and possession by the government of a fingerprint card of the defendant was even raised as a ground for reversal. In the 31 cases which Malizia cites in connection with this point, only three cases (none of which are Federal cases) concern the possible prejudice of fingerprint cards. In each of the three cases, the actual fingerprint card complained of had been introduced into evidence and in none of the cases was the conviction reversed.

prejudicial. All those holding government jobs and all those considered for military service are fingerprinted, and the fingerprints referred to at trial may well have been thought to have been obtained by the agents from another agency. See *United States* v. *Dichiarinte,* 385 F.2d 333, 337 (7th Cir. 1967). Significantly, references to prior governmental possession of a photograph of a defendant (again in the context of establishing the identity of a defendant) is clearly proper even where the witness testifying to a prior photographic identification is able to identify the defendant in court. *United States* v. *De Sena,* 490 F.2d 692, 695 (2d Cir. 1973); *United States* v. *Forzano,* 190 F.2d 687 (2d Cir. 1951). If anything, references to prior governmental possession of a defendant's photograph are more suggestive of previous criminality than the prior possession of fingerprints since they imply antecedent arrest or surveillance. The government simply does not generate and maintain photographic files in connection with non-law enforcement purposes as it does fingerprint files.

In short, the testimony of the fingerprint card, was if error, harmless error, and far from the "plain error required for reversal when no objection is made below. Fed. R. Crim. P. 52(b).

POINT II

Judge Motley's charge was not improperly coercive

Malizia next contends that the conviction must be reversed because Judge Motley gave what he characterizes as an improper Allen charge in the original and only charge to the jury. The point is entirely without merit, as a reading of the charge shows that it was complete, fair to the defendant, and hardly coercive.

Malizia's complaint is that Judge Motley told the jury that the case was important and "must be decided." Malizia reads too much into one sentence. Surely the fact that in one short paragraph out of a twenty-five page charge, Judge Motley suggested that the case was important and must be decided does not render the charge coercive. Judge Motley clearly did not order *this* jury to reach a verdict in *this* trial.* Moreover, she properly and fairly pointed out, as had both Government and defense counsel, that the case was important to both sides. In any event, immediately after her words on the subject of the case being decided she told the jurors not to single out any one instruction alone as stating the law, but to consider the instructions as a whole (Tr. 574). At the end of the charge she made very clear to the jury that no juror should surrender his honest conviction solely because he was outnumbered or for any other reason, and further that the verdict had to reflect the conscientious conviction of each juror (Tr. 594-595).

As for the case being submitted to the jury at 9:30 P.M., (the verdict was returned shortly after 11:00 P.M.) the

---

* Indeed, even in the context of a jury which had already reported itself deadlocked, this Court upheld trial judge's statement that "our law requires a retrial unless the jury is unanimous." *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973).

case was short (two days of testimony), and relatively simple (one count involving one sale). The jury had a long dinner hour and had been advised early in the evening (6:30 P.M. approximately) that they would start deliberations that evening, would be taken home by bus if they had not reached a verdict and could return the next day to continue deliberations (Tr. 560-561). These circumstances including Judge Motley's instructions to the jury on being fair (Tr. 560, 561, 571, 593-595), on the presumption of innocence (Tr. 574-575, 591), on reasonable doubt (Tr. 575-577) and on the credibility of witnesses (Tr. 577-579) were entirely proper.*

---

* If anyone was prejudiced by the evening schedule, it was the government. Malizia's counsel summed up for approximately one hour. The prosecutor followed and had spoken for less than thirty minutes when Judge Motley unexpectedly interrupted him and sent the jury out for dinner. When the jury returned more than one hour later the government was allowed only ten minutes to complete its summation.

Additionally, Judge Motley's schedule did not allow the government time to inquire as to whether it could introduce rebuttal evidence with respect to the testimony of Henry Peters, Malizia's surprise witness. The government was given only a few minutes to check with the New York City licensing bureau to determine if Peters had in fact operated Christine's luncheonette in February, 1971 as he testified he had. The first report the government received from the licensing bureau was that Peters had a license to operate the luncheonette only until a date well before February, 1971. If this had been checked out further which could not be done in the twenty minutes allowed by Judge Motley on Friday afternoon after the bureau was closed, Peters' whole testimony could have been shown to have been a fabrication (Tr. 501-505).

Another factor in determining the trial schedule, aside from the undesirability of adjourning a three day trial over a three day weekend was Judge Motley's concern with what she considered to be defense counsel's deliberate attempts to delay the case so that it would have to be carried over the weekend (Tr. 596-598).

POINT III

The evidence of Malizia's flight was properly admitted to show his consciousness of guilt.

Malizia contends finally that the evidence that he fled shortly after the sale of cocaine to the informant, was a fugitive for three years thereafter, and used at least two false names and a disguised appearance while a fugitive should have been excluded because there was no evidence either that he fled immediately upon committing the crime or that he was ever informed directly of the charges. This contention is without merit.

As to the first point, it is correct that no evidence was introduced as to exactly when Malizia fled. All the govern- knew was that when they sought to arrest Malizia both in New York City and at his home on February 24, 1971, one week after the sale, he had already fled, and so far as the agents were able to determine from long hours of surveillance, never returned to his home, or any where else where he could be located. No law is cited in Malizia's brief and none has been found to the effect that the government must prove a defendant fled within a specific period after the commission of a crime before it can introduce evidence of flight. Such a rule would be especially nonsensical where the crime was, in the eyes of the defendant, unwitnessed and without a complaining victim.

As to the second point, that the government did not prove the defendant had been specifically notified of the charge in this case before he fled, the law is clear that the government need not prove actual notice of the charge to the defendant. This rule is entirely sensible because proof of actual notice would most often be impossible. The act giving rise to the inference of consciousness of guilt is the flight of the defendant after the commission of the crime. The defendant's knowledge that he is being sought or has

been charged with a crime or the existence of an arrest warrant is not a prerequisite for the admissibility of the evidence. *United States* v. *Ayala*, 307 F.2d 574 (2d Cir. 1962); *United States* v. *Waldman*, 240 F.2d 449 (2d Cir. 1957), *Shorter* v. *United States*, 412 F.2d 428 (9th Cir.), *cert. denied*, 396 U.S. 970 (1969); *United States* v. *Edmonds*, 273 F.2d 108, 114 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 977 (1960). Similarly it is well established that flight may be proved by showing the efforts of the police to attempt to locate the defendant. *United States* v. *Waldman*, 240 F.2d 449 (2d Cir. 1957); *Kanner* v. *United States*, 34 F.2d 863, 866 (7th Cir. 1929).*

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

BANCROFT LITTLEFIELD, JR.,
S. ANDREW SCHAFFER,
Assistant United States Attorneys, Of Counsel.

---

* Judge Motley's charge on flight properly put the matter in perspective and included an instruction that the significance of the evidence on flight was entirely for the jury to determine and was only to be considered as evidence of consciousness of guilt if the jury found the defendant knew he had been, or believed he would be, indicted (Tr. 591 593).

★ U. S. Government Printing Office 1974—719—875 / 371—74

AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Bancroft Littlefield, Jr. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13 day of June 1974 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Goldberger, Feldman + Breitbart
401 Broadway, Suite 306
N-Y, N-Y 10013

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Bancroft Littlefield

Sworn to before me this

13th day of June 1974

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975